# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

DISTRICT COUNCIL 91, INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO and ITS AFFILIATED INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES NORTHWEST INDIANA, LOCAL 460,

and

Case 13-CB-082856

# **BRENTON COOK, AN INDIVIDUAL.**

Christina M. Ortega, Esq. (NLRB Region 13) of Chicago Illinois, for the Acting General Counsel

Paul T. Berkowitz, Esq. and Suzanne C. Dyer, Esq. (Paul T. Berkowitz & Associates, Ltd), of Chicago, Illinois, for the Respondent

#### **DECISION**

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves the failure of a union district council and its affiliated local union to refer a member for work in the first half of 2012, allegedly in retaliation for his complaints about the union's dues structure and other local union affairs. In addition, the case involves the alleged attempt by the unions to cause an employer not to hire the member for these same reasons. As to the first claim, the government has proven that the union failed to refer the employee for work during this period. However, under the applicable legal standard, the government bears an initial burden of proving that the unions' failure to refer the employee was motivated, at least in part, by unlawful considerations. As discussed herein, I find that instead of proving this, the government has assumed—or perhaps, more accurately, unreasonably inferred—the requisite unlawful motivation for the unions' actions. Accordingly, the government has failed to meet its burden. As to the second claim, the record is devoid of union actions that may be characterized as an attempt to cause an employer to discriminate against the member. Accordingly, I recommend dismissal of the complaint.

# STATEMENT OF THE CASE

Brenton Cook filed an unfair labor practice charge on June 11, 2012, amended July 16 and October 11, 2012, which was docketed as Case 13–CB–082856 by Region 7 of the National Labor Relations Board (Board). On November 19, 2012, based on an investigation of this charge, the Acting General Counsel (General Counsel) of the Board, by the Acting Regional Director of Region 7, issued a complaint alleging violations of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (Act) by District Council 91, International Union of Painters and Allied Trades, AFL–CIO (District Council 91) and its affiliate, International Union of Painters and Allied Trades Northwest Indiana, Local 460 (Local 460 or the Local).

A hearing in the case was conducted January 24, 2013, in Chicago, Illinois. Counsel for the General Counsel and the Respondents filed briefs in support of their positions by March 4, 2013. On the entire record, I make the following findings, conclusions of law, and recommended order.

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## **JURISDICTION**

It is alleged in the complaint, admitted by the Respondents, and I find that Local 460 and District Council 91 are, and at all material times have been, labor organizations within the meaning of Section 2(5) of the Act. It is further alleged, admitted, and I find, that Atlantic Plant Services, Inc. (APS) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

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## **UNFAIR LABOR PRACTICES**

#### **FACTUAL FINDINGS**

District Council 91 is a labor organization chartered by the International Union of Painters and Allied Trades and is composed of 13 affiliated local trade unions in Indiana, Kentucky and Tennessee. Through these local unions, District Council 91 represents approximately 3,000 members. Local 460 is an affiliate or member of District Council 91 and represents painters and allied tradesmen in northwest Indiana.

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Local 460 is a "referral hall." District Council 91 operates the referral hall for the Local, and refers workers to contractors who have indicated they need qualified workers. But Local 460 is not an exclusive "hiring hall"—i.e., it is not the exclusive supplier of employees for any contractors or employers. Employees can and do get hired directly by contractors. Contractors who are signatories to an agreement with District Council 91 can and do hire and even bring (up to certain percentage levels) their own employees. Some contractors, such as APS work under arrangements in which they can bring up to 50 percent of their own workers with them, and then seek the remaining manpower from the applicable District Council 91 local union. If the District Council cannot quickly fulfill the employer's needs then the contractor can hire their own work force.

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In the spring of 2012, BP-Amoco was engaged in a significant modernization of its refinery in Whiting, Indiana. This project demanded a huge number of contractors. In 2011, contractors began arriving in large numbers, setting up offices and infrastructures and moving equipment to the site. Later, in early spring 2012, the contractors began to need manpower. An array of contractors sought hundreds of qualified workers to work at the site and Local 460 and District Council 91 were the source of scores or even hundreds of calls each day from members and nonmembers seeking work at the BP facility, as well as from contractors seeking workers. There were approximately 500 people working at the BP facility in crafts represented by District Council 91. The need for painters in the spring of 2012 was beyond the normal number of painters that the Local was used to providing. During this time period, District Council 91 and Local 460 were turning no one away who was qualified and seeking work. Employees also sought work directly from contractors working at the BP site.

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Charging Party Cook has been a painter for 30 years and a long-time member of Local 460. From 1992 to 1994 he was appointed to complete a term as the Local's treasurer. From June 1994 to 1997 he served as the Local's recording secretary, an elected position. He served

as recording secretary again from 2008 to 2011. During this time, unless out of town on work, Cook regularly attended monthly membership meetings and, pursuant to his office, monthly executive board meetings.

Between 2008 and 2011, Cook complained on more than one occasion about what he referred to as the assessment of "double dues" when he worked in Michigan under the jurisdiction of another local union.

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Under the Local 460 and District Council 91 dues structure, members pay a "working assessment," a percentage of their day's earnings that goes to the District Council. A separate "minimum dues" is paid by each member to Local 460, without regard to their earnings or work. This "minimum dues" must be paid in order to maintain membership in the Local. When Cook (or any other member of Local 460) worked within the jurisdiction of another district council, they confronted a different dues arrangement. In Michigan, Cook found that under the Michigan-area district rules his minimum dues were paid out of the working assessment. According to Cook, the International Union's constitution provided that a local's minimum dues were used to cover and comply with the "per capita tax" required by the constitution. Cook objected that his minimum dues in Michigan paid the per capita tax for him, but then he was still being assessed another minimum dues payment by Local 460 as a condition of remaining a member of Local 460.

Cook raised this issue with the Local 460 business representative, Henry Posey, and then with Henry Sierra, who became the business representative in 2008. Cook recalled raising this issue at the first executive board meeting that he and Sierra attended after their election in 2008. Cook told Sierra that he had raised it with Sierra's predecessor, Posey, and that Cook wanted to make sure that Sierra knew about the issue. Sierra told Cook that he would look into it. Cook raised the issue eight or nine months later at an executive board meeting. According to Cook, Sierra said he had been busy learning his new job and that he would look into it, but "hadn't really had time." Cook testified that he understood Sierra was busy and that was "ok." About a year later, Cook raised the issue again during 2010. Cook testified that Sierra told him the issue had been "kicked up to the international."

Then in late February or early March 2011, Cook testified that he talked to International Union Representative Harry Zell about the dues issue and a number of other items of business relating to the Local. At one point, Cook complained to Zell about the hiring practices of the Local. Cook was concerned that the organizer for the Local, Robert Howe, was hired as a full-time organizer, although he had not attended enough meetings to qualify for an officer position. Cook thought it a concern that someone who did not qualify to be "a part-time officer" could end up with a full-time organizer position. Cook also expressed concern about the Local's hiring of secretaries, and complained that a recent one who had allegedly "stole money" had been hired from an area bar called Arvin's. Cook told Zell, "[M]aybe it's time we stopped hiring out of Arvin's Bar."

In the summer of 2011, Cook ran for election as District Council 91 business manager/secretary treasurer, the top position in the District Council. Henry Sierra and a member named Kevin Popa also ran. Sierra was elected. Cook only received seven votes (The membership is upwards of 3000 although the record does not describe the number of votes cast.)

In approximately August 2011, Cook spoke with Zell again. He described the "double dues" issue and told Zell that his understanding was the issue had been "sent up to the

international." Zell said it was the first he had heard of it, and that "it would be a matter to be resolved with the financial secretary." Zell also suggested that Cook could solve the problem if he "clear[ed] out," which meant if he transferred his membership from Local 460 to a local in another district council's jurisdiction. This would relieve Cook of his obligation to pay minimum dues (or any dues) to Local 460.

Sierra's testimony confirmed Cook's in general terms. He agreed that Cook brought the dues issue to Posey, and that once Sierra assumed the position of business representative in 2008, Cook brought it up with him on several occasions. Sierra testified that the dues issue was a question of interpretation of the Union's by-laws and the general constitution of the International Union. Sierra testified that he discussed the issue with Zell on several occasions, the last time in 2012, and that Zell indicated that the business manager of the local union in Michigan (presumably Local 312, where most of Cook's work outside of Local 460 occurred) had stated that "the dues schedule is where it stands." Sierra understood this to mean that the dues obligations would not be altered.

Sometime in October 2011, Cook sent a letter addressed to the financial secretary of Local 460 stating:

I have been [i]nformed by Harry Zell that since my minimum dues are paid through the dues check off levied by Painters Local Union 312:

- 1. It is the responsibility of the Financial Secretary of Painters Local #460 to contact the Financial Secretary of Painters Local Union 312 to decide how to handle the disposition of said minimum dues.
- 2. That I do not have to pay "double" minimum dues.

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Sierra testified that the District Council received this letter November 10, 2011, as indicated by the stamp his office's uses to mark received mail. Sierra wrote a note on Cook's letter instructing someone named Kyle: "You will contact the Fin. Sec. of L.U. 312 to resolve this issue."

Cook received no response to his letter. He wrote again, on December 27, re-sending the earlier letter, and enclosing a check for \$200 to the Local to pay toward his minimum dues. Cook added an additional note at the bottom of this letter stating that he had paid his minimum dues to other locals in whose jurisdiction he worked in Michigan and New Jersey, for July-November 2011. Cook noted that he had received no response to his earlier letter and was sending in a check. However, Cook added,

If this check is taken for minimum dues, it will necessitate my filing a complaint with the DOL. I do not wish to do this, but since this local has known about this matter since at least 2007 and has taken no action, I am left no choice.

After Thanksgiving 2011, and again in December, Cook testified that he called the field representative assigned to Local 460, Bobby Howe, to see if there were work opportunities available in the area. Cook testified that he called Howe's personal cell phone. Cook testified that he did not receive a call back. Notably, although Cook's home phone records were introduced into evidence by the General Counsel, and although counsel represented that she possessed his cell phone records, no record of the calls to Howe were introduced into evidence.

On December 22, 2011, Cook called Howe's union-provided phone and left a message for Howe, asking for a return call. According to phone records introduced into evidence at the hearing, the call was returned about half an hour later, but Cook was out and did not receive it. Twenty minutes after that, the caller, who turned out to be the new union organizer/field representative, Jim Loftis, called back.

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Loftis had recently begun working for District Council 91 as a field representative/ organizer on November 15, 2011. He assisted Howe with grievances, organizing, and other daily activities related to the District Council and Local 460. In early January 2012, Loftis was promoted to business representative for the northern region, which includes Local 460. He works out of the District Council 91 and Local 460 offices, which are located at the same location in Merrillville, Indiana. With regard to the referral hall, Loftis identified his responsibilities as taking names of people who called or came in looking for work, whether they be members or nonmembers of the Local. He also took calls from people who wanted to be put on the "out of work" list.<sup>1</sup>

Loftis testified, "I'm basically, the liaison between the members or non-members or anyone looking for a job, for that matter, and the contractors to try to supply manpower . . . for different jobs."

Loftis identified himself to Cook as the new organizer for the Local 460 area and he and Cook talked about a mutual friend they had. Cook told Loftis he wanted to be put on the out-of-work list and the list to be referred to contractors seeking employees for the BP Amoco project. Cook said that Howe was supposed to do this. Loftis, who was driving, asked if Howe had done so and Cook said he did not know, but he wanted to go to work at the BP site in the spring. According to Cook, Loftis said that "he would check on it, and . . . if Bobby hadn't put me on it,

Cook testified that he spoke to Loftis again in January 2012. However, this call, like the

one allegedly made to Howe's number in November, is unsubstantiated by phone records.

he could." Cook testified that he also mentioned the "double dues" issue to Loftis, but Loftis told him, "I really wouldn't know what to do about that" and that is all that was said on the matter.

On March 27, 2012, Cook called Loftis and Loftis called him back. Loftis told him, "I'm sure you're on the list. You must be on the list. I'll check again." Then the two had some small talk, discussing, among other things, a business representative from another local union who had died, and his widow, whom both Cook and Loftis knew. According to phone records, this call lasted nearly eight minutes.

Cook called Loftis on May 8, 2012 and Loftis answered. This conversation lasted nearly five minutes according to phone records. This time Cook told Loftis "I'm getting calls from people all over the place that I know saying they're coming out there to work at BP." Cook called Loftis to find out why he had not been called out there yet. Loftis told Cook, "[Y]ou know, we're not a strict hiring hall. You're not prevented from seeking work on your own." Cook said, "Well what happened to the list, you know? Aren't you sending people out there?" According to Cook, Loftis, said, "[w]ell, we've sent some but, you know, they can hire their own." According

<sup>&</sup>lt;sup>1</sup>Members who are unemployed and collecting State unemployment benefits are asked to call in and asked to be placed an "out-of-work" list maintained by the Local. This allows the Local to verify a member's unemployment if the appropriate State agency calls to inquire about the member's status.

to Cook the conversation ended with Loftis saying, "Don't worry, they didn't get me out of Arvin's Bar."

After this, Cook took steps on his own to seek employment at APS. On May 25, he contacted Jim Mintanis, a superintendent at APS, which was one of the chief contractors hiring painters at the BP refinery. Mintanis told Cook that additional employees were being hired that Monday. This prompted Cook to call Loftis and leave him a message saying that Mintanis wanted Cook's paperwork sent out right away and there was a possibility that Mintanis could put him to work. Cook did not receive a return call from Mintanis. The next week Cook faxed paperwork on his personnel history to Mintanis himself.<sup>2</sup>

Cook testified that he lived four miles away from the union hall. He testified that he never drove to the hall to seek to be placed for a job because driving his car "is not what you'd call pleasant. It's quite a chore." Moreover, "everybody else calls in; why can't I." Indeed, when Cook was at the hall on May 8, 2012, to give a statement in a Department of Labor investigation, he did not ask about getting placed for work, or whether he was on the BP list, or where he was on the list, or why he had not been referred for work at BP. Cook testified that as of May 8, he did not realize that he had a complaint, although his account of his telephone conversation with Loftis later that afternoon suggests that he did.

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Loftis admitted using the phone identified by Cook but professed no recollection of talking with him. He did not recall telling anyone that he was not hired out of Arvin's Bar. Indeed, Loftis testified that until the hearing he could not have identified Cook, and claimed to have had no awareness of the "double dues" complaints until the unfair labor practice charge was filed in June 2012.

Loftis described being overrun with calls and inquiries from potential employees and from contractors related to the massive scope of the BP project. According to Loftis, we went into "survival mode" as he struggled to keep up with the demands of a job that was new to him. Loftis estimated that he received from 60 to 200 calls a day during the peak times of the BP project and made 50-60 calls daily. People got on the list by calling, by coming down to the hall, and of course, many people were hired by contacting the contractors directly. Loftis also testified that his normal practice when he received a call seeking work was to take the information regarding their qualifications and contact information and pass it on to his administrative assistant who actually maintained the BP list, which was a handwritten, informally maintained list of people who had called or come in seeking to be referred out. Loftis testified that he would write their name, number and qualifications down on a "sticky note" and forward it to the secretary. The secretary kept a "running out-of-work" list and, as of late February 2012, a list of people who had requested to be referred out to work at the BP site.

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Loftis described a continuing process of spikes in hiring, layoffs, and more work opportunities as contractors performed work in between weather issues, problems receiving the right equipment, and complicated sequencing arrangements. Loftis took calls from and referred out members and nonmembers alike. He also took calls from contractors and attempted to provide workers when contractors asked for workers. Loftis testified that he and his secretary

<sup>&</sup>lt;sup>2</sup> When Cook told Mintanis his name and local affiliation, Mintanis asked Cook why the Local had not sent him out to them. Mintanis added, [Y]ou're on the wrong side of the cli[que], aren't you?" In response to counsel's objection, I ruled that this was hearsay: i.e., it does not prove Cook was on the wrong side of the clique. Mintanis did not testify, and there is no evidence of the source of his opinion. Hence, I cannot give any weight to his statement.

did "the best we could" given the frenzy of hiring and interest in work around the BP project. Because Loftis was overwhelmed, many people who left messages with him were not called back. However, Loftis testified that no one was turned away and categorically denies any intent or plan to ignore Cook's requests. Basically, Loftis explained that "it was very hard" keeping up with the volume of calls and requests and there were "just too many calls" to remember every conversation.

#### **CREDIBILITY ISSUES**

10 I found all the witnesses in this case to be credible, for the most part. Cook testified straightforwardly and I accept his account of the phone calls he had with Loftis—with two exceptions. The General Counsel used Cook's phone records to corroborate his testimony of his conversations with Loftis that occurred on December 22, 2011, on March 27 and on May 8, 2012. These phone records also corroborated Cook's testimony that he called Loftis on May 25, 2012, but Loftis did not return the message. These calls also appear to be corroborated in 15 the phone records of Loftis that were submitted into evidence.<sup>3</sup> However, there is no corroboration of the calls Cook claims to have made to Howe in November 2011, or the phone conversation he claims to have had with Loftis in January 2012. These calls do not show up on Cook's home phone records (or on Loftis' records). Asked about the fact that the call to Howe 20 did not show up on his phone records, Cook volunteered that he used his cell phone for that. Counsel for the Respondent asked to see those records, and counsel for the General Counsel agreed to share the records. We took a break in the proceedings for that purpose. After the

recess, no phone records were offered into evidence to support the claim that Cook called Howe. Similarly, no records were introduced to corroborate the claim that Cook called Loftis in

January 2012. As noted Loftis' telephone records also do not show such a call.

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Given this, I do not credit Cook's testimony that he made the uncorroborated calls to Howe in November and to Loftis in January 2012. With all the other calls corroborated, with the January 2012 call not showing up in Loftis' records, even as a voice mail, with the General Counsel appearing to be in possession of phone records for both of Cook's phones, and with no explanation for the failure to corroborate two of five alleged phone calls/conversation, I discredit the testimony about the January 2012 phone conversation and the November call to Howe.

Having said this, I do credit Cook's testimony about the other calls. There was nothing suspicious in terms of credibility in his demeanor or description of the calls. And of course, the other party to the calls, Loftis, does not (and given the phone records, reasonably cannot) deny they occurred. He says he cannot remember them out of the many calls he took and made with employees from December 2011 through May 2012. Thus, I credit Cook's uncontradicted testimony about these calls.<sup>4</sup>

<sup>&</sup>lt;sup>3</sup>Whenever Cook's records showed a short call to Loftis' number, usually identified by Cook as a voice message, Loftis' records show a voice message received by his phone within an hour, although his records do not identify the number from which the message came. Though not precisely identified in Loftis' records, I believe that those were Cook's voice messages, and the time delay in receiving (or at least recording them in Loftis' records) is probably a function of his messaging service.

<sup>&</sup>lt;sup>4</sup> Of course, the fact that I am willing to credit some but not all of Cook's testimony is not unusual. It is long settled that "[i]t is no reason to refuse to accept everything a witness says, because you don't believe all of it, nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 753 (2d Cir.

That is not to say that I discredit Loftis. He offered his testimony that he recalled nothing of the particulars, or even the occurrence of the calls with Cook, with a credible-seeming demeanor. I do have some hesitation in accepting that he does not remember any contact with an employee named Cook. After all, he had three calls with him, two in which they discussed common acquaintances. One lasted nearly five minutes. One lasted nearly eight minutes. At least once the unfair labor practice charges filed in June focused his attention on any calls he might have received relevant to the case, it would not be surprising if Loftis could remember at least some glimmer of the conversations with Cook occurring. But at the end of the day, I am convinced by his demeanor that he does not remember the calls, and I accept his explanation—essentially that in the thousands of calls he fielded during this time, he cannot remember them all, and does not remember these. No evidence contradicts it, and I accept that testimony as true. I do not find it as fantastic and unbelievable as urged by counsel for the General Counsel.

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Sierra was also a good witness. I had no problem with his demeanor. He was vague at times about when he talked with Zell, but readily admitted talking with Zell about Cook's dues problem. It was not a priority for Sierra, something Cook understood, and a point that is consistent with his lack of detailed recollection of the timing of the conversations he had with Zell. I credit Sierra's testimony, with the following exception.

The one inconsistency in his testimony occurred when, after denying that he believed Cook to be a hard person to approach or to get along with, counsel for the General Counsel confronted Sierra with a pretrial affidavit in which he endorsed those very statements. On this basis the General Counsel contends (GC Br. at 6) that

Sierra's change in testimony at the hearing was in an effort to make Cook appear less credible. . . In view of Sierra's willingness to change his testimony, Sierra should not be credited with respect to relevant issues in this case.

This significantly overstates the matter. Whatever prompted this discrepancy—whether design or forgetfulness—it was not an effort to make Cook appear less credible. The issue mooted is Sierra's credibility. I accept for purpose of my analysis that Sierra's personal opinion of Cook is as stated in the affidavit, not as he originally testified at the hearing, more on that later. But in terms of credibility, a contradiction in a personal opinion is not like a contradiction in fact. By definition personal opinions are subjective, circumstantial, amorphous, and are stated differently in different contexts. While I do discredit Sierra's assertion at trial that he did

1950), revd. on other grounds, 340 U.S. 474 (1951); *Conley Trucking*, 349 NLRB 308, 316 fn. 18 (2007), enfd. 520 F.3d 629 (6th Cir. 2008).

<sup>5</sup>The statement in Sierra's affidavit is not relevant for the truth of the matter asserted: i.e., for the proposition that Cook was hard to get along with and hard to approach. Rather it is relevant to show Sierra's opinion of Cook. As such, it is admissible pursuant to Fed R. Evid. 803(3). See 5 *Weinstein's Federal Evidence* § 801.11[5][c] (Joseph M. MClaughlin, ed., Matthew Bender 2d ed. 1997) ("Words or conduct offered as circumstantial evidence of an actor's beliefs or thoughts do not constitute statements under the rule against hearsay. Thus, the rule against hearsay does not bar evidence introduced to show a party's viewpoint or attitudes"). In any event, while a witness's affidavit is usually offered only for impeachment purposes, when the witness is an agent of a party opponent (and Sierra was a high ranking official of the Respondents), a prior statement constitutes an admission of a party opponent pursuant to Fed. R. Evid. 801(d)(2).

not believe Cook was hard to get along with or hard to approach, I do not find it appropriate to adopt the General Counsel's suggestion that I rely on that discrepancy to discredit Sierra with respect to all issues in the case. Of course, just as with Cook, the fact that I am willing to credit some but not all of Sierra's testimony is not unusual. See footnote 4, infra.

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Sierra testified that he had nothing to do with referrals after becoming business manager in the summer of 2011, and that he told no one that they should not refer Cook. I credit this testimony. Notably, even if I were to accept the General Counsel's invitation to discredit all of Sierra's testimony there would still be no evidence contradicting him on these issues or even suggesting his involvement. This is certainly not a situation where Sierra's demeanor convinces me "not only that the witness' testimony is not true, but that the truth is the opposite of his story." *NLRB v. Walton Mfg.*, 369 U.S. 404, 408 (1962) (quoting, *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952)).

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ANALYSIS

The General Counsel contends that District Council 91 and Local 460 violated the Act in two distinct (but related) ways. First the General Counsel alleges that the Unions failed to refer Cook to BP refinery contractors in the spring of 2012 because of his complaints about dues, and other issues, conduct the General Counsel alleges to be in violation of Section 8(b)(1)(A) of the Act. Second, the General Counsel alleges that the Unions attempted to cause Atlantic Plant Services not to hire Cook for discriminatory reasons, in violation of Section 8(b)(2) of the Act. I consider each contention in turn.

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## 1. The Unions' failure to refer Cook

Section 8(b)(1)(A) of the Act, which makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce . . . employees in the exercise of rights guaranteed in section 7."

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Board precedent is clear that even where, as here, a union refers employees on a non-exclusive basis to employers, "a union's refusal to assist a member in obtaining jobs may violate Section 8(b)(1)(A) when that refusal is in retaliation for the members' protected activity." *Carpenters Local 537 (E.I. Du Pont)*, 303 NLRB 419, 420 (1991); See, *Plasters' Local 121*, 264 NLRB 192 (1982).

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A union member's internal union activities and complaints about union dues policies qualify as protected activity for these purposes. *Laborers, Local 889*, 251 NLRB 1579, 1582–1583 (1980) (union violated Sec. 8(b)(1)(A) by refusing to refer member because of his dispute with union over dues, among other disputes).

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Analysis of an 8(b)(1)(A) allegation of this type is analogous to analysis of an 8(a)(3) discrimination claim against an employer, and thus, appropriately, in assessing 8(b)(1)(A) discrimination cases, the Board uses the analysis for assessing employer discrimination established by the Board in *Wright Line*.<sup>6</sup> *Plasters Local 121*, supra; *Electrical Workers Local 429*, 347 NLRB 513, 515 (2006), remanded on other grounds, 514 F.3d 646 (6th Cir. 2008).

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<sup>&</sup>lt;sup>6</sup>251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

Applying *Wright Line* to a case of alleged union discrimination, it is the General Counsel's burden to establish that the employee's protected conduct was a motivating factor for the union's challenged actions toward the employee. This proof can take the form of direct evidence or can be inferred from circumstantial evidence based on the record as a whole.<sup>7</sup>

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Under the *Wright Line* standards, the General Counsel meets his initial burden by showing "(1) that the employee was engaged in protected activity, (2) that the [union] was aware of the activity, and (3) that the activity was a substantial or motivating reason for the [union's] action." *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999) (quoting *FPC Holding v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enf'g 314 NLRB 1169 (1994)).

Such showing proves a violation of the Act subject to the following affirmative defense: the union, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by demonstrating by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Williamette Industries*, 341 NLRB 560, 563 (2004).

Applying the *Wright Line* analysis to the instant case, it is clear that the General Counsel has met the first two parts of his initial burden, and these are undisputed by the Respondents: Cook's voiced complaints for a four-year period about the Local's dues structure and the Unions knew of it: Sierra talked with Cook about it, Zell talked with Cook about it.<sup>8</sup>

But it is the third part of the General Counsel's burden where evidence is lacking. This prong—proving that Cook's complaints about dues was a motivating reason for failing to refer him out—lacks evidentiary support.

As noted, above, I accept Cook's testimony about his calls and conversations with Loftis, except with regard to the calls which the General Counsel chose not to corroborate with evidence of phone records. (The most likely explanation for this is that the records do not corroborate Cook's testimony.) Thus, I accept as true that Cook had three calls with Loftis between December and May 2012, in which he raised the issue of being put on the BP list. The one on December occurred some months before a BP list was compiled and must, I think, primarily be understood to be a request to be placed on the out-of-work list, a matter that is not advanced as a part of this case by the General Counsel.

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So while I accept that Cook asked on two occasions while a BP list existed to be put on the BP list, the General Counsel has failed to prove that the Unions' failure to put Cook on the list was motivated by an unlawful motive.

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First, it is notable that the record is almost completely devoid of any direct evidence that any animus of any type was maintained by the Unions' agents toward Cook. Cook complained about the dues structure, but every complaint was met with unobjectionable and civil responses by union officials. Cook's complaints about the dues structure were obviously not a pressing priority for Sierra when he became business representative in 2008—and that made sense, even to Cook—but nowhere in the record is there evidence that Cook's complaints were met

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<sup>&</sup>lt;sup>7</sup>Robert Orr/Sysco Food Services, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

<sup>&</sup>lt;sup>8</sup>I do not need to treat with the issue, but I note that the Unions do not dispute that Cook's complaints about dues constituted concerted (and, therefore, protected) activity.

with hostility, or disdain, or provoked displays of animus in any way. One might say that his complaints were met with a measure of indifference—and one can think of that what one wants—but it is, on the surface, at least, the opposite of the response that accompanies or indicates animus.

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What the record does show is that during the period of time when Cook was complaining about the dues structure, Sierra assisted Cook in obtaining work for a contractor working at Inland Steel, and assisted Cook in obtaining work at the Hammond schools. At the Hammond schools job, Sierra processed a grievance Cook filed over the city of Hammond's hiring process. Similarly, Cook voiced his complaints to Zell, who did not testify. But there is nothing in Cook's account of his discussions with Zell—or, for that matter, with Sierra's account of his discussions with Zell about the issue—that suggests hostility to Cook. Finally, Loftis' conversations with Cook, according to Cook's account, bore nothing that could be described as hostile or objectionable. By Cook's own account, Loftis seemed unengaged and uninformed about the dues issue, the consideration of which was far removed from any responsibility he had.

The only direct evidence of *any* dissatisfaction with Cook at all is found in an affidavit Sierra provided to the Board during the investigation of this case, in which he stated:

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I do not recall having any phone conversations or face-to-face conversations with Cook since I have been the BMST of DC 91, July, 2011. When I was a business representative, we talked all the time. Cook was a hard person to get along with. He was hard to approach, and that everything you tried to convey he took as you placing judgment or being condescending to him. I worked with him, by virtue of his position on the executive board as recording secretary (as recording secretary).

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Although I accept this as Sierra's opinion, this (mildly) unflattering assessment of Cook does not amount to much in terms of advancing the General Counsel's case. None of us are required to—or do—like everything about all of our coworkers, or co-members of a church or civic group or union. But more importantly, there is nothing in this opinion—or in any other evidence—that links Sierra's view of Cook to the Unions' BP site referral process. See *Filippo v. NIPSCO*, 141 F.3d 744, 750 (7th Cir. 1998) (union official's personal statement of opinion that employee was a "backstabber" does not provide evidence linking this opinion to the union's handling of employee's grievance). The uncontradicted evidence is that Sierra played no role in decisions about referring members to BP in the spring of 2012. There is no evidence that he talked to Loftis, or anyone else involved in the referral process about his feelings regarding Cook.

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In short, there is no direct evidence—none at all—even suggesting that the Unions' failure to refer Cook to the BP site was discriminatorily motivated.

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It is not, of course, necessary that the General Counsel's case contain direct evidence of animus, or direct evidence of animus motivating the Unions' actions toward Cook. As discussed, above, indirect evidence and circumstance can suffice to meet the General Counsel's case.

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But what is that indirect evidence in this case? The sum of it is that (1) for over a four-year period of time Cook expressed dissatisfaction with the Local's dues structure and (2) that Loftis failed to provide Cook's name to his secretary who physically maintained the handwritten list of people looking to work at BP. From this, the General Counsel urges us to infer a causal

link: that Loftis determined not to put Cook on the BP list to retaliate against Cook because of his ongoing complaints, mostly about dues, a matter that Loftis appears to know nothing about. Notably, while the Board has long recognized that the timing of a respondent's action in relation to learning of protected activity can provide reliable evidence of unlawful motivation, in this case the timing shows the opposite. Cook's protected activity of complaints about the dues structure (and a few other issues) had been ongoing for many years, was known to the Respondents, yet Sierra assisted Cook with grievances and referrals during that time. Nothing in Cook's conduct or the Unions' reaction explains what would suddenly trigger retaliation against Cook in December 2011 through May 2012.

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The General Counsel's argument amounts to the claim that the fact of Cook's complaints about dues, and a few other issues, coupled with what the General Counsel contends is (but I do not accept to be) the fantastic claim by Loftis that he does not recall his conversations with Cook, are sufficient to prove that the Unions retaliated against Cook for his complaints. I reject the implicit contention that Loftis' testimony is a pretext, and I do not accept this post hoc propter hoc reasoning that animus to Cook's protected activity motivated the failure to refer him to the BP site. See, *Trnka v. Local 688*, 30 F.3d 60, 63 (7th Cir. 1994).

In constructing her argument counsel for the General Counsel has submitted an extremely well-written brief, but the arguments butt up against the limits of the record evidence. For example, the General Counsel characterizes (GC Br. at 3) Cook as an "outspoken and persistent critic of Respondent's hiring practices and Respondent Local 460's accounting of union dues," who engaged in a "relentless pursuit" to convince Local 460 to alter its dues structure. This overstates the evidence. The evidence is that Cook was unhappy—not with "accounting of union dues," phrasing that carries whiff of impropriety—but with paying minimum dues to his home local even when he worked in other jurisdictions. He raised the dues payment issue repeatedly, but unremarkably, in correspondence, in executive board meetings, with Sierra, and twice with Zell. The record evidence of his supposedly "persistent" criticism of the union's hiring of secretaries is limited to an offhanded comment he made to Zell. All of these are legitimate issues for Cook to be interested in. But there is no evidence that either his behavior or the reactions of others to his complaint made the Unions "fed up and tired of dealing with Cook" (GC Br. at 11) or made him an obvious candidate for retaliation.

Cook was active in the Local and fully engaged in its governance. And he did not win much support in his bid to become the business agent/secretary treasurer. But this is not evidence proving he was a target for retaliation.<sup>10</sup>

Trnka contended that the union dropped his grievance in retaliation for his past criticism of union leadership and policies, stretching over almost two decades. He cited no evidence of this supposed retaliation beyond the bare assertions that his criticisms took place. To stave off summary judgment in a case where innocent or multiple explanations for a defendant's actions abound a plaintiff must rely on more than *post hoc, propter hoc* reasoning. Trnka did not[.]

<sup>&</sup>lt;sup>9</sup>In *Trnka*, supra, the Seventh Circuit rejected a union member's duty of fair representation claim, explaining:

<sup>&</sup>lt;sup>10</sup>Local unions are full of members who agitate, complain, argue for changes in practices—some of their complaints are well-taken, many are misguided and misconceived, but the fact of complaints, at a level of intensity described in this record, is hardly an obvious precipitant of retaliation.

Notably, I do not view as compelling the argument, heavily relied upon by the General Counsel, that Loftis' statement to Cook in May 2012, that "they didn't get me out of Arvin's bar," is, as the General Counsel contends, "haunting" and "chilling evidence "revealing Respondents' motive for failing to refer him." (GC Br. at 9 and 12.) Counsel for the General Counsel points out that this statement by Loftis echoed Cook's exhortation to Zell in March 2011, that "maybe it's time [the local union] stopped hiring out of Arvin's bar," I am not convinced that this is probative of anything. In the first place, assuming that the Local hired a secretary out of bar, who then stole from the Local and sparked a criminal investigation, Cook was surely not the only person who knew about it and thought that hiring from this bar was a bad practice. The assumption that Loftis' comment must have come from Zell's discussion with Loftis or others of Cook's conversation with Zell is possible, but hardly self-evident. In any event, even assuming, arguendo, that Loftis' comment is deemed to demonstrate that Zell had conveyed Cook's comment to Loftis or others—so what. It does not demonstrate an intent to retaliate against Cook. Rather, it demonstrates intent by Loftis to assure Cook that he is a professional and ethical agent of the Respondents.

Similarly, APS's Superintendent Mintanis' suggestion to Cook that the fact that he was not sent out for employment at BP must be because he was on the wrong side of the clique within the Local is an uncorroborated opinion, that cannot be attributed to the Respondents, much less provide evidence of a motive for not referring Cook. I am sure it stung to hear such a comment, but it may not be used as a substitute for evidence about the Unions' motives.

There is no evidence proving the third prong of the General Counsel's initial *Wright Line* burden. To be clear, my view is not that the General Counsel's argument is impossible, but rather, that it is unproven. It is *possible* that Sierra whispered to his new employee Loftis that if a member named Cook calls looking for work, just forget to put him on the list. I have no way to say for sure that this did not happen, but no evidence suggests it—the suggestion is based simply on the conclusion that Cook was not referred after calling Loftis. Similarly, it is *possible* that Loftis—while taking the time to return two of three of Cook's calls—failed to put him on the BP list as an effort to punish Cook for complaining about dues, but the circumstances do not offer support for that conclusion.

I would add that I agree in theory, as the General Counsel argues, that in order to find a violation there is no requirement that Cook do any more than call seeking a referral, and he need only call once if that call were found to be the fulcrum of discriminatory retaliation. Having said that, it cannot be doubted that Cook's approach to seeking a referral—making three calls to the Loftis in six months time—does not create a record that would serve to highlight the illicit motives of a union seeking to retaliate against him. Had Cook driven the four miles from his home to the union hall and demanded in person to be placed on the BP list, surely the unions' reaction would have either built his case or, alternatively, gotten him referred. The point, of course, is that the inferences that the General Counsel seeks to draw from Loftis "forgetting" to put Cook on the list, have far less persuasive power in the context of Cook's very relaxed approach to seeking a referral.

In sum, the General Counsel's case amounts to the claim that when a union member has a complaint with his local union, any subsequent mishandling of the union's member's interests can be assumed to be motivated by unlawful discrimination. I cannot accept that proposition. And on the evidence here I would have to in order to find a violation. I recommend dismissal of the allegation that the Respondents violated Section 8(b)(1)(A) of the Act.

# 2. Attempting to cause an employer to discriminate against Cook

Section 8(b)(2) of the Act states, in relevant part, that

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[i]t shall be an unfair labor practice for a labor organization or its agents ... to cause or attempt to cause . . . an employer to discriminate against an employee in violation of subsection (a)(3).

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Thus, to find a violation of Section 8(b)(2), the union must "cause," or must "attempt to cause," an employer to discriminate against an employee.

In this case, the General Counsel alleges that the Respondents "attempted to cause" Atlantic Plant Services to discriminate against Cook because Loftis did not respond to the May 25 message Cook left him asking Loftis to send paperwork to Mintanis of APS.

The General Counsel does not cite a single case and I am aware of none that stands for the extreme proposition that a union "attempts to cause" an employer to discriminate by not responding to a phone message from an employee. To make out an 8(b)(2) violation does not require coercion, or even a direct request to the employer that it not employ an employee. But it does require, at least, "some evidence of *union* conduct" that may reasonably be inferred to rise to the level of an implied request that the employer should take action against the employee. Operating Engineers Local 12 (Kiewit Industrial), 337 NLRB 544, 545 (2002) (Board's emphasis) (quoting Toledo World Terminals, 289 NLRB 670, 673 (1988) (cannot infer from union hostility to employees that it had a hand in their removal from employer; there must be some evidence of "union conduct").

There is none here. I recommend dismissal of this allegation.

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### **CONCLUSIONS OF LAW**

The Respondents did not violate the Act as alleged in the complaint. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

35 ORDER

The complaint is dismissed.

40 Dated, Washington, D.C., March 15, 2013

David I. Goldman

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U.S. Administrative Law Judge

<sup>&</sup>lt;sup>11</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.